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December 28, 1998

VIA HAND DELIVERY

Ms. Magalie Salas
Secretary
Federal Communications Commission
The Portals, TW-A325
445 Twelfth Street, S.W.
Washington, D.C., 20554

Re: *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121

Dear Ms. Salas:

Please find enclosed for filing an original and 6 copies of BellSouth's Reply to Oppositions to Its Petitions for Reconsideration and Clarification.

Please date stamp the extra copy and return it to the individual delivering this package. Thank you for your assistance in this matter.

Sincerely,

Austin C. Schlick

Austin C. Schlick

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana	CC Docket No. 98-121

To: The Commission

BELLSOUTH'S REPLY IN SUPPORT OF
ITS PETITION FOR RECONSIDERATION AND CLARIFICATION

The responses to BellSouth's Petition confirm that some aspects of the Commission's Order undermine its effectiveness as a road map for future compliance. AT&T, CompTel, KMC TeleCom, MCI WorldCom, and Sprint have all seized on stray language in the Order to advocate positions that are untenable under the Act. The Commission should grant BellSouth's Petition not just for the reasons provided in that filing, but also to make clear that the opponents' newly stated positions do not reflect the law that governs section 271 proceedings.

I. PCS COMPETES WITH WIRELINE SERVICE IN LOUISIANA

Carriers opposing BellSouth's Petition unabashedly defend the Order's apparent metric test for local competition. See, e.g., CompTel Opp. at 9 ("BellSouth's evidence failed to show that PCS was an actual alternative for any significant number of customers.") (emphasis added); MCI WorldCom Opp. at 3 (BellSouth failed to demonstrate a "significant enough amount" of PCS substitution). As the Commission acknowledged in the Michigan Order, however, section 271(c)(1)(A) does not require that "a new entrant serve a specific market share in its service area to be considered a 'competing provider.'" 12 FCC Rcd 20543, 20585, ¶ 77 (1997).

A similar problem exists regarding geography. Despite the fact that Track A "does not support imposing a geographic scope requirement," id. at 20584, ¶ 76, the Order faulted BellSouth for not providing evidence that the New Orleans subscribers who have substituted PCS for wireline are representative of all Louisiana PCS users. KMC Telecom and MCI WorldCom deny that this amounts to a geographic test, and assert that the Commission was merely unwilling to "extrapolate" from BellSouth's New Orleans study. KMC Telecom at 2; MCI WorldCom at 2. But if Track A does not include a geographic-scope test, and New Orleans consumers have substituted PCS for wireline, there was no need to "extrapolate." A geographic extrapolation requirement is simply a geographic test by another name. The Commission should clarify that its Order did not impose such a test – either directly or indirectly.

While conceding that there are consumers for whom PCS and wireline service are substitutes on the basis of price alone, Sprint attempts to reargue the point that PCS can qualify as Track A competition. According to Sprint, PCS cannot satisfy Track A because it is not an economic substitute (in the antitrust sense) for wireline service. Sprint Opp. at 7, n.8. Based on the same reasoning, Sprint dismisses all instances in which users have substituted PCS for a second or third wireline. Id. at 8. Sprint claims that because PCS is not a sufficiently "close competitor to wireline services," the market for these additional lines – which Sprint calculates as more than 2.1 million lines in BellSouth's region – is irrelevant for Track A purposes. Id. Sprint also contends that "quality differences" such as signal reliability, signal quality, and geographic reach prevent a finding that PCS is a substitute for wireline. Id. at 6.[1] This line of argument

[1] Sprint and others fail to acknowledge that "quality differences" such as portability and included vertical features help to make PCS a substitute for wireline service. AT&T, for example, suggests that price alone determines whether PCS is a substitute for wireline service. AT&T Opp. at 2-3. Yet in the TCI merger proceedings, AT&T is arguing that narrowband Internet access is a "competitive substitut[e]" for broadband access via cable systems, despite price differences,

ignores that when drafting the language of Track A, Congress specifically rejected the comparability test Sprint endorses. See Michigan Order, 12 FCC Rcd at 20585 n.170 (discussing legislative history). And in any event, Sprint has not sought reconsideration of the Commission's determination that PCS providers whose service replaces BOC wireline service qualify as Track A carriers. See Order ¶¶ 25-31.

II. THE ORDER MISSTATES BELLSOUTH'S OSS OBLIGATIONS

Average Installation Intervals. For purposes of its Application, BellSouth has not disputed that it must provide nondiscriminatory access to OSS, as well as to the specifically enumerated items of the competitive checklist. BellSouth pointed out, however, that the Commission's heavy reliance on average installation intervals as a measurement of nondiscriminatory access to OSS is misplaced, since this measurement reflects the end result of provisioning processes that include functions and factors completely unrelated to OSS. See BellSouth Pet. at 6-7.

KMC Telecom responds that execution of CLEC orders "encompasse[s]" OSS, missing the point that measuring a process that includes OSS as well as other network functions and extrinsic factors does not provide an accurate assessment of OSS access alone. Indeed, various commenters concede that average installation intervals measure functions other than OSS. See MCI WorldCom Opp. at 6; Sprint Opp. at 10-11.

Requiring BellSouth to provide average installation intervals also denies BellSouth its acknowledged right to choose the types of evidence that are most suitable for presentation as part

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because narrowband has "features" that broadband does not. AT&T's and TCI's Joint Reply to Comments and Joint Opposition to Petitions to Deny or to Impose Conditions, CS Dkt. No. 98-178, at 29-30 (filed Nov. 13, 1998).

of a section 271 application. See Order ¶¶ 56, 59. BellSouth has provided measurements addressing details of OSS performance such as response and availability, firm order commitments, and order completion intervals, which measure access far more accurately than installation intervals for end-user services. See Stacy (Perf.) Aff. Ex. WNS-1 (Application App. A, Tab 23) (listing measures). The availability of this evidence makes it nonsensical to compel BellSouth to undertake the very expensive task of reconfiguring its systems to separate out factors, such as CLECs' due date preferences, that make average installation intervals unreliable as a measure of OSS performance. See generally BellSouth Reply Br. at 91-92.

Complex Orders. Because complex orders are received and processed "in substantially the same time and manner" as BellSouth's analogous retail orders, the Commission's nondiscrimination standard for OSS access is fully satisfied. Order ¶ 87; see BellSouth Pet. at 7. There is no need to prove nondiscrimination indirectly, by including these complex orders in OSS flow-through calculations. BellSouth Pet. at 7.

According to AT&T, all complex orders nevertheless should be included in BellSouth's flow-through measures because after being manually transmitted by the CLEC, they "are at some point electronically entered into BellSouth's ordering system." AT&T Opp. at 5. As defined by the Commission, "flow through" measures orders that "are transmitted electronically through the gateway and accepted into BellSouth's back office ordering systems without manual intervention." Order ¶ 107; see also id. ¶ 85 n.241 (defining the "gateway" as the interface between CLEC and BOC OSS). Complex orders that are manually delivered, rather than "transmitted electronically through [BellSouth's OSS] gateway," therefore are not includable in the flow-through measurement. Likewise, and contrary to MCI's claim (MCI Opp. at 6-7), the four complex services that can be ordered via EDI are distributed manually to BellSouth's legacy

systems and thus were properly excluded from the "LESOG Eligible" category of BellSouth's flow-through calculations. See Stacy (OSS) Reply Aff. ¶ 64 (Reply App. Tab 11).

Maintenance and Repair Interfaces. CLECs' claims of being unfairly limited in use of TAFI also are incorrect. See, e.g., AT&T Opp. at 6; MCI WorldCom Opp. at 7. Once TAFI validates that a CLEC is accessing one of its own customer accounts, TAFI functions for the CLEC just as it does for BellSouth's retail personnel. Stacy OSS Aff. ¶¶ 160-64. It is not the case that CLECs must use ECTA when BellSouth would use TAFI in its retail operations. See MCI WorldCom at 7-8. CLECs can use TAFI when BellSouth would use TAFI for analogous retail trouble reports. Stacy OSS Aff. ¶¶ 163, 172-177. As for ECTA, the long distance carriers' gamesmanship is again revealed by their nonsensical insistence that while this interface "is superior to TAFI," it is nevertheless discriminatory. MCI at 7-8; AT&T at 6-7.

III. BELLSOUTH OFFERS SUFFICIENT ACCESS TO UNBUNDLED NETWORK ELEMENTS

Methods of Access. While collocation is the only method of access to UNEs contemplated by the 1996 Act, see Ameritech Comments at 23, BellSouth offers to negotiate other methods of access that are technically feasible and consistent with the Eighth Circuit's holdings and other applicable rules. BellSouth Pet. at 9. Opponents of BellSouth's Petition do not dispute that the Order overlooked this fact, but rather contend that BellSouth's offer is "meaningless" unless BellSouth provides methods of access that violate the holdings of the Eighth Circuit and other applicable rules. AT&T Opp. at 8; MCI WorldCom Opp. at 8; CompTel Opp. at 4-7. They are plainly incorrect. See generally Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 622 (D.C. Cir.) ("agency discretion is defined by and circumscribed by law"), vacated on other grounds, 817 F.2d 890 (D.C. Cir. 1987). Indeed, the Commission has itself recognized

the limiting force of background law, and specifically the Iowa Utilities Board decision. Order ¶ 168 (CLECs entitled to request technically feasible methods of access "that are consistent with the holdings of the Eighth Circuit").

Nor is BellSouth's use of a Bona Fide Request process inappropriate. See CompTel at 2-3. BellSouth cannot define in advance (and CLECs have showed no interest in negotiating) every technically feasible, lawful method of access to UNEs. The Commission has approved the Bona Fide Request process as a permissible approach in such situations. See, e.g., Order ¶ 205 (dedicated transport); id. ¶ 220 (vertical features).

Collocation Intervals. Several carriers rhetorically claim that the collocation intervals to which BellSouth has committed are unacceptable. AT&T Opp. at 9; MCI WorldCom at 9; Sprint at 20. Not one of these companies, however, alleges – much less attempts to show – that BellSouth's intervals deny efficient CLECs a meaningful opportunity to compete. BellSouth's intervals have been acceptable to those carriers in Louisiana that actually have sought collocation, which constitutes strong evidence of their reasonableness. Having declined to arbitrate this issue before the Louisiana PSC, the long distance carriers cannot credibly challenge BellSouth's intervals before this Commission.

IV. THE ORDER MISSTATES BELLSOUTH'S LOCAL SWITCHING OBLIGATIONS

Vertical Features. While BellSouth has voluntarily agreed to provide CLECs with vertical features that are loaded in the software of a BellSouth switch, the Commission's suggestion that BellSouth must provide these features is inconsistent with the 1996 Act. BellSouth Pet. at 10. MCI WorldCom claims that the Eighth Circuit upheld such mandatory "modifications" to a BOC's network. MCI WorldCom Opp. at 10; see also AT&T Opp. at 9-10. This is incorrect.

The Eighth Circuit struck down the Commission's rules requiring that incumbent LECs alter their networks to provide superior-quality interconnection and access. Iowa Utils. Bd. v. FCC, 120 F.3d 753, 812-13 (8th Cir. 1997), cert. granted sub nom. AT&T v. FCC, 118 S. Ct. 879 (argued Oct. 13, 1998). The only modifications the Commission has the authority to order are those needed to accomplish interconnection or to provide a way of accessing network elements the incumbent must provide – not modifications that provide access to a superior network. See id. at 813 n.33.

Collection of Reciprocal Compensation Payments. Contrary to the Order, BellSouth provides CLECs with a reasonable surrogate for actual terminating usage data for reciprocal compensation purposes. BellSouth Pet. at 11. AT&T itself concedes that BellSouth has proposed a potentially acceptable surrogate method. AT&T Opp. at 10. MCI WorldCom, however, insists that a surrogate billing method "is no substitute for [actual usage] data" – an argument directly at odds with the Order. MCI WorldCom Opp. at 10; see Order ¶ 233. If MCI seriously believes that the Commission's commonsense approval of surrogate methods is wrong, it should have sought reconsideration on this point.

V. THE ORDER IMPOSES IMPROPER BRANDING REQUIREMENTS

BellSouth's method of branding operator service and directory assistance calls is identical for its retail operations and for CLECs.[2] MCI WorldCom claims that BellSouth must show that this uniform procedure has the same economic effect on all carriers. MCI WorldCom Opp. at 11-12. As the Commission has held, however, the fact that BellSouth's method of branding is the

[2] MCI WorldCom contends that BellSouth's discussion of branding presents new evidence. MCI WorldCom Opp. at 11. This assertion is without merit, as even AT&T concedes. AT&T Opp. at i, 1-2 (faulting BellSouth for not presenting new evidence in its Petition).

same for CLECs and BellSouth's retail operations itself establishes nondiscrimination. Order ¶ 247; cf. id. ¶ 87 (OSS access is nondiscriminatory where CLECs and BOC have access to analogous functions in substantially the same time and manner). BellSouth is under no obligation to provide individual CLECs with the method of access to branding that is most advantageous for them (although a CLEC could request and pay for such access through BellSouth's Bona Fide Request process). See AT&T at 11-12; MCI WorldCom at 11-12; see also AT&T Agreement Attach. 14 § 1.0 (Application App. B., Tab 30) (BFR process). Furthermore, while AT&T and MCI endorse the Automatic Number Identification method of access to branding in this proceeding, they have never requested that BellSouth provide this method despite three years of cooperative work between BellSouth and the CLECs on this issue. See generally Milner Aff. ¶ 86 (Application App. A, Tab 14) (discussing BellSouth's investigation of AIN method with AT&T); Milner Reply Aff. ¶¶ 3-4 (Reply App. Tab 7) (no requests for methods other than line class codes and AIN).

VI. THE COMMISSION DOES NOT HAVE AUTHORITY OVER PRICING OF INTERIM NUMBER PORTABILITY

Various parties dispute that the Eighth Circuit denied the Commission jurisdiction over pricing of INP. Order ¶ 289; AT&T Opp. at 12; MCI WorldCom Opp. at 14; Sprint Opp. at 22. The Eighth Circuit's holding could not be clearer. "The terms of the Act clearly indicate that Congress did not intend for the FCC to issue any pricing rules, let alone preempt state pricing rules regarding the local competition provisions of the Act." Iowa Utils. Bd., 120 F.3d at 788-89 (emphasis added). Nor did the Eighth Circuit carve out an exception for INP, as some CLECs claim. The court of appeals cited INP, along with resale, UNEs, and other items, as areas in which the Commission has some rulemaking power under section 251, but it rejected the

Commission's claim of pricing authority in these same areas. 120 F.3d at 794-95 & n.10. The Commission should acknowledge that this limitation, which the Order properly respected as a general matter, Order ¶ 60, applies with full force to INP.

VII. THE ORDER REQUIRES A DEGREE OF DISCLOSURE UNDER SECTION 272 THAT IS UNWARRANTED

While the Order purports merely to apply existing disclosure requirements under section 272, Order ¶¶ 334-339, MCI WorldCom and Sprint effectively concede BellSouth's point that the Order actually imposes new requirements. MCI WorldCom Opp. at 13-14; Sprint Opp. at 16. The Commission may not amend its rules implementing section 272 in the course of processing section 271 applications. See Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981) (agency may not "create new law by adjudication rather than rulemaking"), cert. denied, 459 U.S. 999 (1982); Pfaff v. HUD, 88 F.3d 739, 748 (9th Cir. 1998) (same). Furthermore, there is no statutory support for requiring additional disclosure, nor any legitimate reason for it. The Commission has already concluded that there is "no need" for additional disclosure beyond what was required in the Accounting Safeguards Order and Non-Accounting Safeguards Order, because these rules "effectively prevent predatory behavior that might result from cross-subsidization."[3] The additional disclosure suggested by the Order and urged by the interexchange incumbents thus is not a legitimate protection against discrimination or cross-subsidy, but only a vehicle by which the AT&T, MCI WorldCom, and Sprint could obtain competitively sensitive information about the Bell companies' business plans and operations.

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[3] Report and Order, Implementation of the Telecommunications Act of 1996: Accounting Safeguards under the Telecommunications Act of 1996, 11 FCC Rcd 17539, 17551, ¶ 28 (1996); see also First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905 (1996).

VIII. THE PUBLIC INTEREST TEST MAY NOT BE USED TO EXTEND THE ACT'S COMPETITIVE CHECKLIST

MCI WorldCom grossly misstates BellSouth's argument when it contends that BellSouth has asserted that the public interest standard "is nullified" by the competitive checklist. MCI WorldCom Opp. at 16. BellSouth has simply pointed out what should be beyond dispute – that the public interest test is not a license to extend the local-market requirements of the competitive checklist. 47 U.S.C. § 271(d)(4); see BellSouth Pet. at 18; see also BellSouth Br. at 74-76; BellSouth Reply Br. at 100-03. This rule cannot be circumvented through the semantics of calling additional requirements "considerations." See AT&T at 15. When determining whether an agency decision is arbitrary and capricious, courts assess "whether the decision was based on a consideration of the relevant factors . . . ." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Accordingly, a decision that rests "on factors which Congress has not intended [the agency] to consider" is unlawful. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Board of County Comm'rs v. Isaac, 18 F.3d 1492, 1497 (10th Cir. 1994) ("An agency acted arbitrarily and capriciously if it relied on factors deemed irrelevant by Congress . . . ."). This rule applies with particular force to performance measurements because this is an area where Congress assigned jurisdiction to the states, not the Commission. See BellSouth Pet. at 18-19.

CONCLUSION

BellSouth's Petition for Reconsideration and Clarification should be granted.

Respectfully submitted,

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December 28, 1998

CERTIFICATE OF SERVICE

I, Bernadette Murphy, hereby certify that on this 28th day of December 1998, I caused copies of BellSouth's Reply in Support of Its Petition for Reconsideration and Clarification to be served via first-class United States mail upon all parties on the attached service list, except those parties designated with an asterisk, who will be served by hand.

Bernadette Murphy

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